
(1954) 04 MAD CK 0047

In the Madras High Court

Case No : C.S. No's. 51 and 163 of 1951

India Coffee and Tea Distributing Co. Ltd.

APPELLANT

Vs

The State of Madras

RESPONDENT

Date of Decision : 26-04-1954

Acts Referred:

Constitution of India, 1950 — Article 14, 245, 286
Madras General Sales Tax (Turnover and Assessment) Rules, 1939 — Rule 5
Madras General Sales Tax Act, 1939 — Section 14A, 2, 3(3), 5

Citation : AIR 1954 Mad 1030 : (1959) 72 LW 420

Hon'ble Judges : Ramaswami, J

Bench : Single Bench

Advocate : T.L. Balakrishnan, for the Appellant; Asst. Govt. Pleader and G. John Arthur, for the Respondent

Final Decision : Dismissed

Judgement

Ramaswami, J.—These are two connected suits filed for a declaration that the assessments of sales-tax made on the plaintiffs are illegal and void.

2. The facts are:- The plaintiffs Messrs. India Coffee and Tea Distributing Company Ltd., First Line Beach, Madras, are a firm of commission agents at Madras and other places. Their business consists of sales of tea in this State on behalf of the resident principals and foreign exports on behalf of non-resident principals. In these suits we are concerned only with the latter transactions, viz., foreign exports. The "modus operandi" of the plaintiffs firm in regard to these foreign exports, is as follows: These commission agents have representatives at London and New York. These representatives enter into contracts with buyers for the supply of tea from particular tea estates and transmit their agreements to the commission agents. The buyers are enjoined to open invariably irrecoverable letters of credit with a bank at Madras. These commission agents then intimate their principals, viz., A. V. Thomas and Co. Ltd., Alleppey, with a branch at Calicut, to despatch the goods. The goods are sent either C. I. F. or P. O. B.

Mostly the despatch is on F. q. B. and presenting the bill of lading at the bank in which the credit has been opened the commission agents realise the full value of the tea exported.

3. In C. S. No. 51 of 1951 the case for the plaintiffs is as follows: During the year 1-4-1947 and 31-3-1948 the plaintiffs sold as commission agents tea and rubber of the total value of Rs. 43,03,172. Out of this sum a sum of Rs. 22,14,765 represented the price of goods sold on behalf of principals resident within the State; and the balance of Rs. 20,88,407 represented sales on behalf of foreign principals Rs. 19,68,065 being the price of goods exported outside India and Rs. 1,20,342 being the price of goods sold within the State. By his order dated 9-12-1949 the Deputy Commercial Tax Officer, Mannady Division, Madras, assessed the plaintiffs to a tax of Rs. 44,855 on the aggregate amount of Rs. 43,03,172.

Against the said order the plaintiffs preferred an appeal 308 of 1949-50 on the file of the Commercial Tax Officer, Madras. That officer passed an order on 7-2-1950 wherein he validated the licence in favour of the plaintiffs on payment of a penalty of Rs. 1000 and in consequence exempted the sum of Rs. 22,14,765 representing the value of the goods sold on behalf of the principals resident within the State, and confirmed the assessment in respect of the balance of Rs. 20,88,407 representing the price of goods exported outside India or sold locally on behalf of foreign principals. The tax payable by the plaintiffs under this order is Rs. 21,207. The plaintiffs preferred a revision to the Board of Revenue against the order of the Commercial Tax Officer, North Madras, dated 7-2-1950. By an order dated 13-7-1950 the Board confirmed the order of the Commercial Tax Officer and dismissed the revision.

4. In C. S. No. 163 of 1951 the case for the plaintiffs is that in respect of sales effected, by them as commission agents during the year 1-4-1948 to 31-3-1949 the Deputy Commercial Tax Officer, Mannady Division, passed an order on 7-3-1950 assessing them to a tax of Rs. 57,340, on a total turnover of Rs. 36,69,741. Against that order the plaintiffs preferred an appeal to the Commercial Tax Officer, North Madras, in App. No. 24 of 1950-51. The said Officer passed an order on 20-6-1950 reducing the tax only by a sum of Rs. 700. In the result the plaintiffs were assessed to tax of Rs. 56,640. The plaintiffs took up the matter in revision to the Board of Revenue and the Board passed an order exempting sales by the plaintiffs on behalf of principals resident within the State by validating the licence retrospectively for the entire period on payment of a penalty of Rs. 2000. With reference to sales other than those made on behalf of principals resident within the state the Board referred the plaintiffs to the Commercial Tax Officer, North Madras, by its order dated 26-12-1950. The Commercial Tax Officer, North Madras, in turn referred the plaintiffs to the Deputy Commercial Tax Officer by his order dated 5-1-1951 and eventually the Deputy Commercial Tax Officer passed an order on 24-1-1951 fixing the total turnover at Rs. 21,40,743 and assessed the plaintiffs to a tax of Rs. 33,449.

5. With reference to the assessment for the year 1950-51 the Deputy Commercial Tax Officer, Mannady Division, made an order on 8-2-1950 determining the turnover of the plaintiffs at Rs. 2,96,750 and assessed them to a tax of Rs. 4637 thereunder. The plaintiffs preferred an appeal to the Commercial Tax Officer, North Madras, in App. No. 359 of 1949-50 against the order of assessment made by the Deputy Commercial Tax Officer. On 4-4-1950 the Commercial Tax Officer, North Madras, passed an order exempting sales on behalf of the principals resident within the State by validating the licence retrospectively for the entire period on payment of a penalty of Rs. 200 and as a result of the said validation reduced the assessable turnover to Rs. 25,470 and assessed the plaintiffs to a tax of Rs. 398. Against the said order the plaintiffs preferred a revision to the Board of Revenue and the Board by its order dated 4-11-1950 confirmed the assessment made by the Commercial Tax Officer, North Madras (Note: I have rounded the figure to the nearest rupee for convenience).

6. The plaintiffs contend that they are not liable to be assessed for these amounts on the following five grounds: .

(a) The plaintiffs are commission agents and not dealers and the sales in question are sales . effected only as commission agents. As commission agents they are not dealers selling and purchasing on their own account; nor are they mere agents of the foreign principals because they are principals carrying on business for commission. The plaintiffs accordingly claim that they are not assessable either as dealers or as agents on behalf of foreign principals.

(b) In regard to the amounts representing the value of tea exported to foreign countries during the years under assessment these amounts cannot be assessed for the reason that the sales were not made within the State nor were the goods deliverable within the State. The contracts were concluded in foreign countries; the goods were shipped P. O. B. Cochin and Bombay and C and F foreign ports and were deliverable in foreign countries. These sales were not made within the State. The plaintiffs state that the fact that letters of credit were opened within the State does not convert the sales effected abroad into sales within the State. Moreover, all drafts drawn under the letters of credit are payable after 60 days of sight and therefore payment is not made immediately in the State.

(c) The amounts represent the sale of tea grown by the sellers on estates of which they are owners and as the sales were for delivery outside the State and deliveries were actually so made, they are exempted from assessment u/s 5, Clause (v) of the Madras General Sales-tax Act. The sum included in the total turnover representing the price of rubber sold in Madras cannot be made assessable as rubber is agricultural produce and therefore exempted from taxation.

(d) The plaintiffs, in any event, are entitled to the following deductions under Rule 5 (g) of the Turnover and Assessment Rules, viz., (i) export duty; (ii) cess; (iii) shipping dues and (iv) handling and other charges.

(e) The plaintiffs further claim that the Madras General Sales Tax Act is opposed to Article 286 of the Constitution in so far as it purports to authorise imposition of tax on the sale of goods outside the State and for this reason also the assessments for both the years aforesaid are invalid.

7. The contentions of the state of Madras are reflected in the following issues which have been framed in both the suits:

"C. S. No. 51 of 1951

1. Are the plaintiffs entitled to be both commission agents and principals in respect of the transactions entered into by them?

2. Are not the plaintiffs assessable to tax u/s 14-A of the Madras General Sales Tax Act

and Rule 5 (1) of the Madras General Sales-tax rules?

3. What part of the turnover of Rs. 20,88,407-3-10 refers to commission agency sales on behalf of non-resident principals?

4. What is the extent of local sales of tea effected by the plaintiff on behalf of resident principals. Are not the plaintiffs liable to pay tax. in respect of such sales?

5. Are plaintiffs entitled to exemption in respect of Rs. 19,68,064-11-7 being the value of tea exported to foreign countries? 8. Are the sums of Rs. 16,62,293-8-4 and Rs. 3,03,771-3-3- representing the value of tea exported to foreign, countries from 1-1-1948 to 31-3-1949 not liable to assessment? 7. Are the local sales of tea from 1-4-1947 to 31-12-1947 amounting to Rs. 1,01,969-3-9 on behalf, of foreign principals not liable for assessment?

8. Are the Local sales from 1-1-1948 to 31-3-1948 amounting to Rs. 18,373-1-6 not liable to be assessed?

9. Are the plaintiffs entitled to exemption in respect of the sum of Rs. 1971-1-6 being the sale price of rubber?

10. Are the plaintiffs entitled to the deductions mentioned in paragraph 8 of the plaint?

11. Has this court no jurisdiction for the reasons, stated in paragraph 4 of the written statement?

12. Have the plaintiffs any cause of action against the defendant? B

13. To what relief are the plaintiffs entitled? 1 C. S. No. 163 of 1951

1. Are plaintiffs entitled to be both commission, agents and principals in respect of the transactions entered into by them?

2. Are not the plaintiffs assessable to tax u/s 14-A of the Madras General Sales

Tax Act and Rule 5 (1) of the Madras General Sales-tax Rules?

3. What part of the turnover of Rs. 21,40,742-12-8-refers to commission agency sales on behalf of non-resident principals?

4. What is the extent of local sales of tea effect-ed by the plaintiffs on belialf of resident principals? Are not the plaintiffs liable to pay tax in respect of such sales?

5. Are plaintiffs entitled to exemption in respect of Rs. 19,75,078-1-8 being the value of tea exported to foreign countries?

6. Are not plaintifis liable to pay sales-tax on the sum of Rs. 95,104-8-0 being the price of rubber sold in Madras as turnover of sales of rubber?

7. Are the plaintiffs entitled to the deductions claimed in paragraph 4 (5) of the plaint?

8. Are the plaintiffs entitled to the exemption, claimed in paragraph 6 (1) of the plaint?

9. Are the sales of tea exported to foreign countries exempted from taxation as sales made outside the State?

10. Are the plaintiffs entitled to the deduction claimed in paragraph 6 (3) of the plaint?

11. Are the plaintiffs entitled to any of the overhead charges claimed in sub-paragraph 4 of paragraph 6 of the plaint?

12. is the Madras General Sales Tax Act invalid and opposed to the provisions of the Constitution?

13. Docs the Act affect Article 286 of the Constitution?

14. Have the plaintiffs any cause of action against the defendant?

15. To which relief are the plaintiffs entitled?"

8. Before me both the parties adduced no oral evidence and filed in C. S. No. 51 of 1951 Exs. P, 1 to P. 7 and in C. S. No. 163 of 1951 Exs. P. 1 to P. 9.

9. On a review of the entire circumstances of the case, I have come to the conclusion that the plaintiffs are dealers as the term "dealer" will take in a commission agent also; secondly the the sales in question were all effected within the State of Madras; thirdly, that the plaintiffs are not entitled to claim exemption from assessment u/s 5, Clause (v) of the Madras General Sales Tax Act whatever might be the position of the non-resident foreign principals; fourthly, that the plaintiffs are not entitled to the deductions claimed under Rule 5 (g) of the Turnover and Assessment Rules: and fifthly, that the Madras General Sales Tax Act is not opposed to Article 286 of the Constitution of India. Here are my reasons.

10. Point (a): "Dealer" has been generally defined as any person who carries on the business of selling goods. In Madras, Mysore, Travancore-Cochin and Uttar Pradesh, the term includes a person who carries on the business of purchasing goods. In almost all the Acts except the Madras, Travancore-Cochin, Mysore and Bengal Acts a "dealer" has been defined as a person who sells or supplies goods. There does not seem to be any special significance for the word "supplies". If the supply of goods is for no consideration, then it cannot come within the sales-tax levy, as there is no element of sale. The transaction is essentially a gift. If the supply of goods is for consideration, then there can be no doubt that it is a sale. Hence the word "supplies" does not enlarge the scope of the definition. In all the definitions the following essential features are present (i) there must be a sale; (ii) in the course of carrying on the business of selling goods.

11. The word "sale" is defined in all the Acts. The essential requisite of a sale is a "transfer of property" in goods and this requirement is set out in all the definitions. What is deemed to be a sale is enlarged by other explanations, but the main definition is the same in all the Acts. See Section 2 (g) of the Bengal, Bihar, Madhya Pradesh, Orissa and U. P. Acts and Section 2 (h) of the Madras and Punjab Acts. The Supreme Court in - Poppatlal Shah Vs. The State of Madras, has set at rest the controversy whether the expression "sale" was used in any popular sense. In the words of Mookherjee J. unmistakably the stress is laid in this definition on the element of transfer of property in a sale and no other. The language gives no indication of the popular meaning of "sale". The test, to find out whether transaction is fit sale assessable to tax in a State, is to take the definition and apply it with the aid of the Indian Sale of Goods Act. The nature of the definition of "sale" in the various Acts has been set out thus by Patanjali Sastri J. in - "State of Bombay v. United Motors (India) Ltd.", AIR 1953 SC 253 (B):

"In exercise of the legislative power conferred upon them in substantially similar terms by the Government of India Act, 1935, the Provincial Legislature enacted sales-tax laws for their respective Provinces, acting on the principle of territorial nexus referred to above. That is to say, they picked out one or more of the ingredients constituting a sale and made them the basis of their sales-tax legislation. Assam and Bengal made among other things the actual existence of the goods in the Province at the time of the contract of sale the test of taxability. In Bihar the production or manufacture of the goods in the Province was made an additional ground. A net of the widest range perhaps was laid in Central Provinces and Berar where it was sufficient if the goods were actually "found" in the Province at any time after the contract of sale or purchase in respect thereof was made".

12. The word "business" is a term of wide import. It is even wider than the word "trade"; - "Hesketh Estates Ltd. v. Qraddock", (1942) 25 Tax Cas 1 (C). The habitual doing of an act capable of producing profits for the purpose of profits is trade or business: - "Werle & Co. v. Colquhoun", (1888) 20 Q B D 753 (D). The

Privy Council in - AIR 1936 1 (Privy Council) appears to consider that the essence of business consists in a course of dealings. The motive to make a profit is not a "sine quo non" and if the characteristics of a business are discernible, the absence of profit motive will not take it out of the category of business. Whether a person carries on business or not is essentially a matter of inference. Even if a person is taken to be carrying on a business, the question that may still arise is whether his transactions are assessable in any particular State. For that the transaction will still have to be within the particular State.

It has been held that If all that a person does is to solicit orders in any particular place, he cannot be said to be reasonably carrying on a business in that place: - "Grainger & Son v. Gouch", 1896 AC 325 (F). What is done is only ancillary to the exercise of his trade in the place where he buys, or makes, stores and sells goods. The business must be in buying or selling the goods. The entering into contracts will only be incidental to the purchase or sale as a business. Except the States which have adopted the Madras definition of the word "dealer" in toto, the other States have made it clear in the definition itself that the dealer must be carrying on the business of selling in that State: See e.g., Section 2 (c) of the Bengal, Bihar, Madhya Pradesh, Orissa and U. P. Acts and Section 2 (d) of the Punjab Act. As it has now been held by the Supreme Court in Poppatlal Shah Vs. The State of Madras, ", the sale must be within the State or Province so as to be taxable even under the Madras Act; the absence of the words, viz., "sales inside the State" found in the other Acts does not make a difference.

12A. It will be seen, from this discussion that the term "dealer" will take in a commission agent also. The question whether a commission agent will fall within the definition of a "dealer" has not had an uniform answer till the differences have been resolved by a Full Bench of this Court. In - The Provincial Government of Madras Vs. Neeli Veerabhadrapa and Others, , it was held that a commission agent who sold or bought on behalf of known principals in the sense that the principal was not a fictitious or non-existent principal, but one shown as such in the accounts, was not a dealer and was not liable to assessment under the Sales-tax Act, irrespective of the question whether or not he had obtained a licence u/s 8. This Bench decision approves the decision by a single Judge in - In Re: K.G. Mahadevan, . See also - "Subban Beigh v. Govt. of Mysore", AIR 1953 Mys 19 (I). But a different note was struck in "In re Narasingamuthu Chettiar", AIR 1949 Mad 11 (J) and - "Province of Madras v. Finn of Kanigolla Siva Lakshminarayana", AIR 1949 Mad 843 (K). Therefore, the Pull Bench was constituted to resolve these differences in - "Radha-krinshna Rao v. Province of Madras", AIR 1952 Mad 713 (L) and it was held by the Full Bench as follows:

A commission agent as distinguished from a broker and who is in possession of the goods which he deals with on behalf of another will be a "dealer" within the definition of Section 2 (b) and can be assessed to tax unless he takes a licence u/s 8 and that a broker is an agent employed to make a bargain for another and receives a commission on the transaction which is usually called brokerage. He

has usually neither the custody nor the possession of the goods. It is the broker's duty to establish privity of contract between the principal and the third party. The broker cannot sell in his own name nor can he sue on the contract. A commission agent on the other hand has according to accepted mercantile practice, control over or possession of the goods, and has the authority from the owner of the goods to pass the property in and title to the goods. When a commission agent sells goods belonging to his principal with his authority or consent, and without disclosing the name of the owner, there is certainly a transfer of property in the goods from the commission agent to the buyer. A business which consists in, such transactions can properly be described as a business of selling goods. A similar position would arise even in the case of a commission agent buying for an undisclosed principal. A commission agent doing this kind of business is therefore a dealer as defined in Section 2 (b) of the Sales-tax Act which does not contemplate as a necessary condition that the goods sold should belong to the person selling or buying. See also - *Dowlath Vs. Dey, District Forest Officer*, . I have discussed the distinction between a broker and a commission agent and set out the entire English and Indian case-law. Therefore, applying these principles I find that these plaintiffs are dealers as defined in Section 2 (b) of the Madras Sales-tax Act.

13. Point (b): The contention of the State is that these sales took place within the State of Madras. The nature of the transactions relating to this turnover was as follows: The goods were shipped F. O. B. Cochin and C & P foreign ports and the goods were deliverable in foreign countries. In respect of all such exports made by the plaintiffs, the documents of title relating to the goods were negotiated through banks in Madras under letters of credit opened by the foreign buyers. When full amounts were drawn by surrendering documents of title specific goods were thus unconditionally appropriated to the contracts and the sales were completed in Madras. Even if drafts payable after 60 days of sight were drawn, moneys were still drawn in Madras on the strength of the documents of title to the goods and it is therefore that these transactions are sales within the meaning of the Madras General Sales-tax Act, and the turnover with reference to such sales has thus become assessable turnover. The contention of the State is concluded by authority. It has been held in the Bench decision of - " *The Commissioner of Income Tax, Madras Vs. The Mysore Chromite Ltd.*, following the "*Prinz Adalbert*" 1917 AC 586 (O) and - "*Smyth (Ross T) & Co. Ltd. y. T. D. Bailey Son & Co.*", 1940 3 All ER 60 (P), that where a bill of exchange is accepted and the delivery of the bill of lading is obtained from the bank and irrevocable letter of credit is drawn that place will be the place where the property in the goods would pass and that where property in the goods passed that place would be the place where the sale is effected. Subsequently another Bench of this court (*Satyanara-yana Rao and Rajagopalan JJ.*) applied the same principles to a case arising under the Sales-tax Act in - " *State of Madras Vs. Mysore Lachia Shetty and Sons Ltd.*, Mangalore, . Therefore the transactions in regard to which the exemption is asked for were transactions

effected within the State of Madras.

14. Point (c) in regard to tea, Section 2 (a) lays down that agricultural or horticultural produce shall not be deemed to include tea. The Privy Council held in - "Kaju Mal v. Saligram", AIR 1924 PC 1 (R) that tea was an agricultural product. This definition has nullified the effect of that decision. This was done by means of an amendment of the General Sales-tax Act (Madras Act 25 of 1947) and which has apparently come into force under Part IV-b of the Fort St. George Gazette Extraordinary, dated 11-12-1947. The period for which exemption is now claimed is for a period of nine months prior to the coming into existence of this amendment. In regard to rubber no decided case has been brought to my notice. But the recent decision of the Privy Council in - "Mustafa Ali Khan v. Commr. of Income Tax UP Ajmer", AIR 1049 PC 13 (S), has to some extent facilitated the evolving of clearer definition of the expression. In the above case Lord Simonds observed :

"It is sufficient for the purpose of the present appeal to say (1) that in their opinion no assistance is to be got from the meaning ascribed to the word "agriculture" in other statutes and (2) that, though it must always be difficult to draw the line, yet unless there is some measure of cultivation of the land, some expenditure of skill and labour upon it, it cannot be said to be used for agricultural purposes within the meaning of the Income Tax Act." This Court had also held that the word "agriculture" implied something which is achieved with the aid of human agency. See - "Gangadhara Rama Rao v. Commr. of Income Tax Madras", AIR 1947 Mad 157 (T) and this decision was approved by the Privy Council. Following the Privy Council decision this court held in - "Commissioner of Income-tax Vs. K.E. Sundara Mudaliar and Others, that irrespective of the nature of the produce or product of the land, whatever is grown on land aided by human labour and effort, whatever does not grow wild or spontaneously on the soil without human labour or effort would be an agricultural product.

15. The following have been held to be agricultural products: Betel leaves: - "Murugesu Chetty v. Chinathambi Goundan", 24 Mad 421 (V); Coffee: - "Kunhayen Haji v. Mayan", 17 Mad 98 (W). The latter decision can no longer be good law in view of the test laid down by the Privy Council decision, Commissioner of Income-tax Vs. K.E. Sundara Mudaliar and Others, "Chandramani Pattamahadevi v. Municipal Council, Vizaga-patam", AIR 1946 Mad 143 (Y); Cardamom: - "Kadirvelsami Naicker v. Ahmed Badruddin Rowther", AIR 1917 Mad 160 (Z); Coconut: - "Venkayya v. Ramasami", 22 Mad 39 (Z); - "Allavarapu Subbayya Vs. Jakka Peddayya and Another, " R. Venkataswamy Naidu, Peelamedu, Coimbatore Vs. The Commissioner of Income Tax, Madras, "Commr. of Income Tax Burma v. Kokine Dairy", AIR 1938 Rang 260 (Z4);- T. Sarojini Devi Vs. T. Sri Krishna, "Producers" Co-operative Distributing Society Ltd. v. Commr. of Taxation", 1948 AC 210 (Z6). Forest is agriculture if growing was with the aid of human agency and not if growth was spontaneous - "Secy, to the The Chief Commissioner of Income Tax Vs. Zamindar of Singampatti, ; -

"Maharaja of Kapurthala v. Commr. of Income Tax Central & UP", AIR 1945 Oudh 35 (Z8); Fishery - Inland not agriculture - Maharajadhiraj of Darbhanga Vs. Commissioner of Income Tax, ; Toddy; cultivation is agricultural income: - The Commissioner of Income Tax Vs. Yagappa Nadar, . The above does not, however, represent an exhaustive list.

16. The use of the word "horticulture" in juxtaposition with the word "agriculture" cannot be construed to mean, that the word "agriculture" is used in a narrow sense. The decisions under the Madras Estates Land Act in - "Raja of Venka-tagiri v. Ayappa Reddi", AIR 1915 Mad 781 (Z11) & - "Seshayya Garu v. Rajah of Pittapur", AIR 1917 Mad 649 (Z12) cannot be pressed into service in construing this Act as in these cases the report of the Select Committee omitting the words "siviculture" and ""pasturing" from the bill was taken to show that the Legislature contemplated only a restricted interpretation of the word. Rubber on these principles may be construed as an agricultural produce. But the sale of agricultural or horticultural produce is exempt from the levy of sales-tax in the hands of a grower of such produce or a person having an interest in the land in which the produce is grown: See Section 2 (i).

17. Bearing these facts in mind let us examine the exemption claimed relating to tea for a period of nine months. The contention of the State is twofold, viz., that the exemption can be claimed only in the case of resident growers and cannot be claimed by non-resident growers; secondly, exemptions can be claimed by the non-resident principal and not by his commission agent - rcst-ing the former upon the language of Section 5 (5) and the latter upon the wording of Section 14-A of the Sales-tax Act.

18. u/s 5 (v) of the Act sale of tea grown by the seller or grown on any land in which he has an interest, whether as owner, usufructuary mortgagee, tenant or otherwise, is exempt from levy of sales-tax on two conditions, viz., (i) the sale must be for delivery outside the State, that is to say, the terms of sale must provide for delivery outside the State; and (ii) must actually be so made. In such a case the sale of tea shall be exempt from tax u/s 3(1). This is the taxing section on which the entire Act and the rules thereunder revolve. This section prescribes that a tax can be collected under the Act not from anybody and everybody, but only from a dealer whose turnover is Rs. 10,000 or above in the year of assessment. Who is a dealer has already been considered. It is clear that to be a dealer for attracting taxability, he must either be an owner of the goods or a person who has custody thereof with authority to transfer the property therein as in the case of a commission agent. Then there are two classes of persons under the term" "seller of the tea growing his own produce". He may be a resident or non-resident of the State who has no agent but comes into the State himself and sells and delivers goods or he may be a non-resident with a recognised commission agent here. But whatever be the class under which he falls as contended for by the State of Madras u/s 5 (v) exemption to sales tax for tea is limited to tea produced and sold by the resident estate owners and cannot

be claimed in regard to tea produced outside the province by non-resident estate owners and sold within the Province by their accredited representatives or agents.

19. The other part of the contention of the State of Madras that even if the exemption can be claimed by the non-resident estate owner producing and selling tea in question this cannot be done by his commission agent inside the Madras State and can only be claimed by the principal is equally well-founded. Section 14-A as has been pointed out by Sri N. R. Raghavachariar in his "locus classicus" "Sales-tax in Madras" published by the Law Weekly, Madras, assisted by Sri V. C. Srikumar is designed to afford an easy method for collection of taxes due in respect of transactions carried on by persons residing outside the State through agents residing inside the State. The tax under the Act being one on dealings irrespective of the person who deals, it is necessary that the taxes due in respect thereof should be made payable by the person immediately concerned in such transactions and since the principal in respect of those transactions when residing outside the State cannot be easily reached, his agent who puts through the transactions within the State and who ordinarily will not be liable he not being a dealer strictly so called, is statutorily deemed to be dealer for the purposes of the Act. This has also been put effectively in another way by Sri V. Sethuraman in his comprehensive all India publication "The Law of Sales-tax in India (published by S. Viswanathan "Acton. Lodge" 11, McNichol Road, Chetput, Madras 10) as follows:

"The non-resident dealers by virtue of their absence from this State may escape assessment. If they do not have any property, then even if assessment were to be made it will be futile as recovery of the tax levied will be impossible. The non-resident dealers will then be at an advantage. This section, is designed to make them assessable and to collect the tax easily on such assessments".

A similar provision for taxing non-residents through their agents is also found in the Indian Income Tax Act. But this is only an enabling provision for facilitating collection where for instance the non-resident has no agent here. but comes into the State himself and sells and delivers, goods he is liable to tax because the sale has taken place in this State and the plea that there is no adequate machinery to levy and collect the tax from such a non-resident is not relevant as the difficulty in collection is not a bar to making the assessment. Secondly, Courts have held that such a provision does not preclude a direct assessment. In - "Public Prosecutor v. K. Sankunni", 1953 2 Mad LJ 48 (SN) (Z13) it was held that a non-resident dealer liable to tax under the Madras General Sales-tax Act cannot escape liability merely because the resident agent is also liable. Similarly Courts have held that such a provision in the Indian Income Tax Act does not preclude a direct assessment: - "Deputy Commr. & Secy, to the Chief Commr. of Income Tax Madras v. Bhanjee Ramjee & Co.," AIR 1921 Mad 212 (SB) Z14). This section provides two safeguards, first for the commission agent and secondly for the principal.

20. In the case of non-resident buying or selling goods in the Province or State but residing outside, his agent shall be deemed to be the dealer. The agent will then be deemed himself to have carried on the business. The agent if he carries on a separate business himself and is assessable, as a dealer under the Act, there will be two assessments on him: (i) in his name for his business and (ii) in his name as the agent of the nonresident dealer. If the non-resident's turnover is less than Rs. 10,000 then also the agent will be taxed. There will be no exemption for the turnover being less than the assessable minimum. But, the agent is assessable only to the extent of the turnover of such non-resident with which he is concerned. If the non-resident has several agents in several places or even in each place, each of such agent will be assessable separately. The agent is safeguarded by being authorised under the Act to retain out of any amount payable to the non-resident an amount equal to the tax assessed on or paid by him in respect of the nonresident's turnover. This is without prejudice to his other rights like a right to file a suit. The non-resident is equally safeguarded because if he proves that his entire turnover in the State was less than the minimum assessable u/s 3 (3) he may apply to the assessing authority, if there has been only one assessment through his agent for refund of the tax, if any, paid on his behalf. If there has been more than one assessment then the State Government is empowered to designate the authority to whom refund application will have to be made. The period within which application for refund has to be made is 12 months from the end of the financial year in which payment was made.

21. But this does not mean, as has been well put by Sri N. R. Raghavaiah in his Sales-tax in Madras, that Section 14-A (iv) is expressly restricted to an application for refund being made on the ground of the turnover being less than Rs. 10,000. By reason of the provision in the opening paragraph of Section 14-A making the rest of the Act applicable to the transactions of nonresident dealers it is perfectly clear that Sub-section (iv) also covers cases of exemption contemplated in respect of agricultural or horticultural produce. So, though initially the agent of a non-resident principal is assessed on a turnover it is open to the non-resident principal to make an application to the assessing authority and establish to his satisfaction that the produce assessed in the hands of the agent was agricultural produce grown by the principal himself or grown on any land in which such non-resident principal has an interest and therefore exempt from assessment.

22. To postulate otherwise would lead to absurdities because first of all under the Act whenever any exemption is claimed the burden of proof is upon that person claiming that exemption, viz., the grower and seller of tea outside the State. It has been well laid down in Crawford on "Construction of Statutes", Section 258 is as follows:

"Provisions providing for an exemption may be properly construed strictly against the person who makes the claim of an exemption. In other words, before an

exemption can be recognised, the person or property claimed to be exempt must come clearly within the language apparently granting the exemption. The reason for requiring a strict construction of statutes in favour of the State where a person claims immunity from the common burden of taxation, has been ably stated by Mr. Justice Brewer, as appears from the quotation from his opinion in - "Stahl v. Educational Association of the Methodist Church", 54 Kan 542 (Z15);

"All property receives protection from the State. Every man is secured in the enjoyments of his own, no matter to what use he devotes it. This security and protection carry with them the corresponding obligation to support. It is an obligation which rests equally upon all. It may require military service in time of war, or civil service in time of peace. It always requires pecuniary support. This is taxation. The obligation to pay taxes is co-extensive with the protection received. An exemption from taxation is a release from this obligation. It is the receiving of protection without contributing to the support of the authority which protects. It is an exception to a rule, and is justified and upheld upon the theory of peculiar benefits received by the state from the property exempted. Nevertheless it is an exception; and they who claim under an exception must show themselves within its terms. Moreover, exemption laws are in derogation of equal rights, and this is an equally important reason for construing them strictly. And a third reason appears from the court's language in - "Bank of Commerce v. Tennessee", (1896) 161 US 134 (Z16)". Taxes being the sole means by which sovereignties can maintain their existence, any claim on the part of any one to be exempt from the full payment of his share of taxes on any portion of his property must on that account be clearly defined and founded on plain language. There must be no doubt or ambiguity upon which the claim to the exemption is founded. It has been said that a well founded doubt is fatal to the claim, no implications will be indulged in for the purpose of construing the language used as giving the claim for exemption, where such claim is not founded upon the plain and clearly expressed intention of the taxing power.

See also - "Commr. of Income Tax B & O v. Visheswar Singh", AIR 1935 Pat 342 (Z17); - COMMISSIONER OF INCOME TAX, BIHAR and ORISSA Vs. MAHARANI LAKSHMIBATI SAHEBA OF DARBHANGA., . Secondly, the commission agent is constituted as agent, only for the purpose of selling and by a fiction of law he is treated as a dealer for a limited purpose, i. e., assessability on the first instance. Such a person with limited rights to act on behalf of the principal cannot be looked upon as the person who would be entitled to claim exemption on behalf of the principal. So far as this agent is concerned, whether the assessment is levied or whether exemption is granted, his liability "vis-avis" the principal is not in any way affected and a safeguard is provided in his retaining moneys in his hands to reimburse himself of the assessment paid out to the Government, His business is to pay up leaving it open to the affected nonresident principal to claim exemption and refund. That is the scheme of this fiscal enactment. Thirdly it is easy to envisage conflicting claims of principal and commission agent in regard to a matter in which the latter is not an agent for the former over exemptions the

former possibly asserting that he is not entitled to exemption and the latter asserting that he is entitled to exemption. It will be easy to multiply other complications of this nature if we are to restrict Section 14-A (iv) expressly to application for refund in regard to turnover being for less than Rs. 10,000 only.

22A. This point is concluded by authority also. In - "Messrs. Padvil & Sons v. State of Madras", (T. R. C. Nos. 121 to 126 of 1953 (Mad) (Z19)), a Bench of this Court has held that the tax is collected on the turnover of the agent without reference to facts like the turnover exceeding the statutory minimum or not and that thereafter it is open to the non-resident principal to move in the matter and get such refund as is permissible under the Act. In other words, the business of the commission agent is to pay the tax assessed on him and keep a lien on the moneys acquired by him on behalf of the principal and leave it open to that principal to make applications to the assessing authorities and establish to their satisfaction that either the turnover was less than the minimum prescribed or that the agricultural produce assessed in the hands of the agent was grown by himself or grown on any land in which such a non-resident principal has an interest.

23. I therefore accept the contention of the State that the commission agent is not a person who can claim the exemption and refund and it is the non-resident principal who should do so if he is entitled to any such exemption and refund. Therefore, looked at from any point of view this point (c) has to be decided against the claim of the plaintiffs in its entirety.

24. Point (d): The claim for deductions cannot be supported because the items referred to in the plaint reproduced above are not admissible deductions under Rule 5 (1) of the Turnover and Assessment Rules. The sales-tax has been levied on the price of the goods and it has no concern with the overhead expenses incurred by the dealer as the deductions were not charged for separately, without including them, in the price of the goods and the prices, which were either F. O. B or C and F, could not be split up for purposes of deduction. To complete this I must explain the terms if. O. B. or F. O. R., C. I. F. and C and F.

25. The words F. O. B. and F. O. R stand for Free on Board and Free on Rail respectively. Where the seller agrees to sell goods on F. O. B. or F. O. R. terms at means the seller will bear all the expenses prior to the putting on board or rail. As soon as the goods are put on board or rail the responsibility of the seller ceases and the risk as well as property vests in the buyer. Prior to the putting on board a ship or rail of the goods, the seller alone must bear the damages to the goods: - "Underwood Ltd. v. Burgh Castle Brick & Cement Syndicate", 1922 1 KB 343 (Z20) and - "Colley v. Overseas Exporters Ltd.", 1921 3 KB 302 (Z21). (26) The words C. I. F. stand for Costs, Insurance and Freight. The meaning of a contract of sale upon cost, freight and insurance is so well established that it is unnecessary to refer to the authorities" upon the subject. A seller under a contract of sale containing such terms has firstly, to ship at the port of shipment goods of the description contained in the contract; secondly, to procure a

contract of affreightment under which the goods will be delivered at the destination contemplated by the contract; thirdly, to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer; fourthly, to make out an invoice; and finally, to tender these documents to the buyer so that he may know what freight he has to pay and obtain delivery of the goods if they arrive or recover their loss if they are lost on the way: - "Biddell Bros. v. E. Clemens Horst Co.", 1911 1 KB 834 (Z22); - "Copal Chand v. 3. Behrens & Sons", AIR 1930 Lah 640 (Z23); - Girdharilal v. Scales & Adams Ltd.", AIR 1037 Lah 566 (Z24); - "Johnson v. Taylor Bros. & Co. Ltd.", 1920 AC 144 (Z25). The essential feature of an ordinary C. I. F. contract for the sale of goods rests in the fact that performance of the bargain is to be fulfilled by delivery of documents and not by the actual physical delivery of the goods by the vendor. All that the buyer can call for is the delivery of the customary documents. This represents the measure of the buyer's right and extent of the vendor's duty. The buyer cannot refuse the documents and ask for actual goods nor can the vendor withhold the documents and tender the goods they represent. It is in short a transfer of symbols rather than physical property: - "Mambre Saccharine Co. v. Corn Products Co.", 1919 1 KB 198 (Z26). Property passes to the buyer as soon as the documents are delivered to him.

27. There is generally another type of contract called C and F contract. In such contracts, the buyer undertakes to insure the goods while in transit. A. C. & P. contract is for all practical purposes and F. O. B. contract. It was held by this Court in an unreported case - "Commr. of Income Tax v. Burugn Viswanatha Rao", (Ref. Case No. 61 of 1946 (Mad) (Z27) that in the case of such contracts property passes not when the goods are ascertained but subsequently. As to when property passed, Satyanarayana Rao J. observed that it was unnecessary in that case to determine the point of time when property passed while Raghava Rao J. said "The time of shipment is the time of passing of the property to the buyer".

28. Therefore point (d) has got to be decided against plaintiffs.

29. Point (e): The validity of the several State Sales-tax Acts imposing a tax on sales had come up for consideration both before the Republican India and after the Republican India. (For a lucid discussion of this subject, see the comprehensive survey made by Mr. R. Mathurbhutham and R. Srinivasan in their excellent treatise Law of Sales-tax in India, 1954, published by the M. L. J. office pages 36-50). In regard to the former class of cases it is enough, to mention AIR 1939 1 (Federal Court) The Province of Madras Vs. Boddu Paidanna and Sons, and on appeal - "Province of Madras v. Boddu Paidanna & Sons.", AIR 1942 FC 33 (Z30); - "Governor-General in Council v. Province of Madras", AIR 1945 PC 93 (Z31). Then in Republican India the validity of the Sales-tax Act has been impeached as being opposed to Article 14 of the Constitution of India and unconstitutional delegation of the taxing power by the Legislature to the Executive and as violating Article 286 of the Constitution. In regard to Article 14

and unconstitutional delegation, these have been set at rest by - " V.M. Syed Mohamed and Co. and Another Vs. The State of Madras and Another, C. Govindarajulu Naidu and Co. Vs. State of Madras and Another, . In regard to Article 286 this has been the subject-matter of three decisions by the Supreme Court The State of Bombay and Another Vs. The United Motors (India) Ltd. and Others, State of Travancore-cochin and Others Vs. Shanmugha Vilas Cashew Nut Factory and Others, and - "State of Travancore-Cochin v. Bombay Co, Ltd.", AIR 1952 SC 336 (Z35). The above decisions of the Supreme Court: upheld the contention of the Madras State that! the Madras Sales-tax Act does not offend Article 286 of the Constitution. Secondly in any event as Article 286 of the Constitution of India came into force on or after 26-1-1950, this Article would not affect the assessments objected to relating to 1947 to April-May 1949.

30. It is quite true that these decisions of the Supreme Court, as pointed out by Sri V. Sethura-man on page 21 of his Law of Sales-tax in India, have given rise to fresh problems such as where does a delivery take place, how is consumption to be proved, what happens in a case where delivery takes place in one State and consumption in another, etc. The solutions of the problem appear, to be more with the Legislature and possibly by a suitable amendment to Article 286 of the Constitution. But as the appropriate quotations with which Sri R. Mathurbutham and R. Srinivasan begin their excellent treatise Law of Sales-tax In India (M. L. J. publication): "Whoever hopes a faultless tax, to see, Hopes, what never was, or is, or ever shall be (M"culloch Adaptation of Pope")

"To tax and to please, no more than to love and to be wise, is not given to men" (Cicero).

31. In the result, I find in both the suits that the plaintiffs are commission agents and not principals; that the plaintiffs are assessable to tax u/s 14-A of the Madras General sales-tax Act and R. 5 (1) of the Madras Turnover and Assessment Rules; that the sale transactions in dispute took place within the state of Madras; that the plaintiffs are not entitled to the deductions asked for; that the plaintiffs are not entitled to claim exemptions on behalf of the non-resident principals; that the Sales-tax Act is not invalid as opposed to the provisions of the Constitution of India; and that the plaintiffs are entitled to no relief. The issues in both the suits are found accordingly. The suits are dismissed with costs. I certify for two counsel.